

118TH CONGRESS
1ST SESSION

S. 2228

To amend the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 to clarify the scope of a major Federal action under the National Environmental Policy Act of 1969 with respect to certain projects relating to the production of semiconductors, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 11, 2023

Mr. KELLY (for himself, Mr. YOUNG, Mr. HAGERTY, and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 to clarify the scope of a major Federal action under the National Environmental Policy Act of 1969 with respect to certain projects relating to the production of semiconductors, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Building Chips in
5 America Act of 2023”.

1 **SEC. 2. SEMICONDUCTOR PROGRAM.**

2 Section 9909 of the William M. (Mac) Thornberry
3 National Defense Authorization Act for Fiscal Year 2021
4 (15 U.S.C. 4659) is amended by adding at the end the
5 following:

6 “(c) AUTHORITY RELATING TO ENVIRONMENTAL
7 REVIEW.—

8 “(1) IN GENERAL.—Notwithstanding any other
9 provision of law, none of the following shall be con-
10 sidered to be a major Federal action under NEPA
11 or an undertaking for the purposes of division A of
12 subtitle III of title 54, United States Code:

13 “(A) The provision by the Secretary of any
14 Federal financial assistance for a project de-
15 scribed in section 9902, if—

16 “(i) the covered activity described in
17 the application for that project has com-
18 menced before the date on which the Sec-
19 retary provides that assistance;

20 “(ii) the facility that is the subject of
21 the project is on or adjacent to a site—

22 “(I) that is owned or leased by
23 the covered entity to which Federal fi-
24 nancial assistance is provided for that
25 project; and

1 “(II) on which substantially simi-
2 lar construction, expansion, or mod-
3 ernization has been carried out such
4 that the facility would not more than
5 double existing developed acreage or
6 supporting infrastructure;

7 “(iii) the Secretary determines, in the
8 sole discretion of the Secretary, that the
9 laws and regulations governing environ-
10 mental reviews in the State in which the
11 facility that is the subject of the project is
12 or will be located are functionally equiva-
13 lent to the requirements under NEPA;

14 “(iv) the Federal financial assistance
15 provided is in the form of a loan or loan
16 guarantee; or

17 “(v) the Federal financial assistance
18 provided, excluding any loan or loan guar-
19 antee, comprises less than 15 percent of
20 the total estimated cost of the project.

21 “(B) The provision by the Secretary of De-
22 fense of any Federal financial assistance relat-
23 ing to—

24 “(i) the creation, expansion, or mod-
25 ernization of one or more facilities de-

1 scribed in the second sentence of section
2 9903(a)(1); or

3 “(ii) carrying out section 9903(b).

4 “(C) Any activity relating to carrying out
5 section 9906.

6 “(2) SAVINGS CLAUSE.—Nothing in this sub-
7 section may be construed as altering whether an ac-
8 tivity described in subparagraph (A), (B), or (C) of
9 paragraph (1) is considered to be a major Federal
10 action under NEPA, or an undertaking under divi-
11 sion A of subtitle III of title 54, United States Code,
12 for a reason other than that the activity is eligible
13 for funding provided under this title.

14 “(d) LEAD FEDERAL AGENCY AND COOPERATING
15 AGENCIES.—

16 “(1) DEFINITION.—In this subsection, the term
17 ‘lead agency’ has the meaning given the term in sec-
18 tion 111 of NEPA.

19 “(2) OPTION TO SERVE AS LEAD AGENCY.—
20 With respect to a covered activity that is a major
21 Federal action under NEPA, the Department of
22 Commerce shall have the first right to serve as the
23 lead agency with respect to that covered activity
24 under NEPA.

1 “(3) COOPERATING AGENCY.—The Secretary
2 may designate any Federal, State, Tribal, or local
3 agency as a cooperating agency with respect to a
4 covered activity for which the Department of Com-
5 merce serves as the lead agency under paragraph
6 (1), if the applicable agency has—

7 “(A) the jurisdiction to issue an authoriza-
8 tion or take action for or relating to that cov-
9 ered activity; or

10 “(B) special expertise with respect to that
11 covered activity.

12 “(4) ENVIRONMENTAL DOCUMENTS.—

13 “(A) SINGLE DOCUMENT.—All authoriza-
14 tions relating to a covered activity shall rely on
15 a single environmental document and joint
16 record of decision prepared by the lead agency
17 with respect to that covered activity for the pur-
18 poses of NEPA.

19 “(B) INCLUSION.—An environmental docu-
20 ment and joint record of decision described in
21 subparagraph (A) shall—

22 “(i) rely on any comments, analysis,
23 proposals, or documentation developed by
24 cooperating agencies designated under
25 paragraph (3); and

1 “(ii) provide all authorizations nec-
2 essary for the applicable covered activity as
3 if any cooperating agency designated under
4 paragraph (3) had issued an environmental
5 document and joint record of decision.

6 “(e) ADOPTION OF CATEGORICAL EXCLUSIONS.—

7 “(1) ESTABLISHMENT OF CATEGORICAL EXCLU-
8 SIONS.—Each of the following categorical exclusions
9 is established for the National Institute of Standards
10 and Technology and, beginning on the date of enact-
11 ment of this subsection, is available for use by the
12 Secretary:

13 “(A) Categorical exclusion 17.04.d (relat-
14 ing to the acquisition of machinery and equip-
15 ment) in the document entitled ‘EDA Program
16 to Implement the National Environmental Pol-
17 icy Act of 1969 and Other Federal Environ-
18 mental Mandates As Required’ (Directive No.
19 17.02–2; effective date October 14, 1992).

20 “(B) Categorical exclusion A9 in Appendix
21 A to subpart D of part 1021 of title 10, Code
22 of Federal Regulations, or any successor regula-
23 tion.

24 “(C) Categorical exclusions B1.24, B1.31,
25 B2.5, and B5.1 in Appendix B to subpart D of

1 part 1021 of title 10, Code of Federal Regula-
2 tions, or any successor regulation.

3 “(D) The categorical exclusions described
4 in paragraphs (4) and (13) of section 50.19(b)
5 of title 24, Code of Federal Regulations, or any
6 successor regulation.

7 “(E) Categorical exclusion (c)(1) in Appen-
8 dix B to part 651 of title 32, Code of Federal
9 Regulations, or any successor regulation.

10 “(F) Categorical exclusions A2.3.8 and
11 A2.3.14 in Appendix B to part 989 of title 32,
12 Code of Federal Regulations, or any successor
13 regulation.

14 “(G) Any other categorical exclusion
15 adopted by another Federal agency that the
16 Secretary determines would accelerate the com-
17 pletion of a covered activity if the categorical
18 exclusion were available to the Secretary.

19 “(2) SUBSEQUENT CHANGES.—In any NEPA
20 process that is ongoing (as of the date of enactment
21 of this subsection), or that occurs on or after the
22 date of enactment of this subsection, the Secretary
23 may update, amend, revise, or remove any categor-
24 ical exclusion established under paragraph (1).

1 “(3) SCOPE OF REVIEW.—The application of
2 any categorical exclusion established under para-
3 graph (1), as the categorical exclusion may be up-
4 dated, amended, or revised under paragraph (2),
5 shall not be subject to evaluation for extraordinary
6 circumstances under section 1501.4(b) of title 40,
7 Code of Federal Regulations, or any successor regu-
8 lation.

9 “(f) INCORPORATION OF PRIOR PLANNING DECI-
10 SIONS.—

11 “(1) DEFINITION.—In this subsection, the term
12 ‘prior studies and decisions’ means baseline data,
13 planning documents, studies, analyses, decisions,
14 and documentation that a Federal agency has com-
15 pleted for a project (or that have been completed
16 under the laws and procedures of a State or Indian
17 Tribe), including for determining the reasonable
18 range of alternatives for that project.

19 “(2) RELIANCE ON PRIOR STUDIES AND DECI-
20 SIONS.—In completing an environmental review
21 under NEPA for a covered activity, the Secretary
22 may consider and, as appropriate, rely on or adopt
23 prior studies and decisions, if the Secretary deter-
24 mines that—

1 “(A) those prior studies and decisions meet
2 the standards for an adequate statement, as-
3 sessment, or determination under applicable
4 procedures of the Department of Commerce im-
5 plementing the requirements of NEPA;

6 “(B) in the case of prior studies and deci-
7 sions completed under the laws and procedures
8 of a State or Indian Tribe, those laws and pro-
9 cedures are of equal or greater rigor than those
10 of each applicable Federal law, including
11 NEPA, implementing procedures of the Depart-
12 ment of Commerce; or

13 “(C) if applicable, the prior studies and de-
14 cisions are informed by other analysis or docu-
15 mentation that would have been prepared if the
16 prior studies and decisions were prepared by
17 the Secretary under NEPA.

18 “(g) NEPA ASSIGNMENT.—

19 “(1) ASSUMPTION OF RESPONSIBILITY.—

20 “(A) WRITTEN AGREEMENT.—

21 “(i) IN GENERAL.—Subject to the
22 other provisions of this section, with the
23 written agreement of the Secretary and a
24 State, which may be in the form of a
25 memorandum of understanding, the Sec-

1 retary may assign, and the State may as-
2 sume, the responsibilities of the Secretary
3 with respect to 1 or more covered activities
4 within the State under NEPA.

5 “(ii) REQUIREMENTS.—A written
6 agreement between the Secretary and a
7 State under clause (i) shall—

8 “(I) be executed by the governor
9 of the State;

10 “(II) provide that the State—

11 “(aa) agrees to assume all
12 or part of the responsibilities of
13 the Secretary described in that
14 clause;

15 “(bb) expressly consents, on
16 behalf of the State, to accept the
17 jurisdiction of the courts of the
18 United States with respect to
19 compliance with, the discharge
20 of, and the enforcement of any
21 responsibility of the Secretary as-
22 sumed by the State;

23 “(cc) certifies that there are
24 laws of the State, including regu-
25 lations, in effect that—

1 “(AA) authorize the
2 State to take the actions
3 necessary to carry out the
4 responsibilities being as-
5 sumed by the State; and

6 “(BB) are comparable
7 to section 552 of title 5,
8 United States Code, includ-
9 ing by providing that any
10 decision regarding the public
11 availability of a document
12 under those laws of the
13 State may be reviewed by a
14 court of competent jurisdic-
15 tion; and

16 “(dd) agrees to make avail-
17 able the financial resources nec-
18 essary to carry out the respon-
19 sibilities being assumed by the
20 State;

21 “(III) require the State to pro-
22 vide to the Secretary any information
23 that the Secretary reasonably con-
24 siders necessary to ensure that the
25 State is adequately carrying out the

1 responsibilities being assumed by the
2 State; and

3 “(IV) be renewable.

4 “(B) ADDITIONAL RESPONSIBILITY.—If a
5 State assumes responsibility under subpara-
6 graph (A), the Secretary may assign to the
7 State, and the State may assume, all or part of
8 the responsibilities of the Secretary for environ-
9 mental review, consultation, or other action re-
10 quired under any Federal environmental law
11 pertaining to the review or approval of a cov-
12 ered activity.

13 “(C) PROCEDURAL AND SUBSTANTIVE RE-
14 QUIREMENTS.—A State shall assume responsi-
15 bility under this subsection subject to the same
16 procedural and substantive requirements as
17 would apply if that responsibility were carried
18 out by the Secretary.

19 “(D) FEDERAL RESPONSIBILITY.—Any re-
20 sponsibility of the Secretary not explicitly as-
21 sumed by a State by written agreement under
22 this subsection shall remain the responsibility of
23 the Secretary.

24 “(E) NO EFFECT ON AUTHORITY.—Noth-
25 ing in this subsection preempts or interferes

1 with any power, jurisdiction, responsibility, or
2 authority of an agency, other than the Depart-
3 ment of Commerce, under applicable law (in-
4 cluding regulations) with respect to a project.

5 “(2) STATE PARTICIPATION.—The Secretary
6 may develop an application for a State to assume re-
7 sponsibility under paragraph (1), at such a time and
8 containing such information as the Secretary deter-
9 mines appropriate.

10 “(3) SELECTION CRITERIA.—The Secretary
11 may approve the application of a State to assume re-
12 sponsibility under this subsection only if—

13 “(A) the Secretary determines that the
14 State has the capability, including financial and
15 with respect to personnel, to assume the respon-
16 sibility; and

17 “(B) the governor of the State has entered
18 into the written agreement with the Secretary
19 required under paragraph (1)(A).

20 “(4) LIMITATIONS ON AGREEMENTS.—Nothing
21 in this subsection permits a State to assume any
22 rulemaking authority of the Secretary under any
23 Federal law.

24 “(5) AUDITS.—To ensure compliance by a
25 State (including compliance by the State with all

1 Federal laws for which responsibility is assumed
2 under paragraph (1)(B)), for each State partici-
3 pating in the program under this subsection, the
4 Secretary shall—

5 “(A) conduct annual audits for each year
6 of State participation;

7 “(B) not later than 180 days after the
8 date on which the agreement between the Sec-
9 retary and the State is executed, meet with the
10 State to review implementation of the agree-
11 ment and discuss plans for the first annual
12 audit required under subparagraph (A); and

13 “(C) ensure that the time period for com-
14 pleting an audit under subparagraph (A), from
15 initiation to completion, does not exceed 180
16 days.

17 “(6) TERMINATION.—

18 “(A) TERMINATION BY SECRETARY.—The
19 Secretary may terminate the participation of
20 any State in the program under this subsection,
21 if—

22 “(i) the Secretary determines that the
23 State is not adequately carrying out the re-
24 sponsibilities assigned to the State;

1 “(ii) the Secretary provides the State
2 with—

3 “(I) a notification of the deter-
4 mination of noncompliance under
5 clause (i);

6 “(II) a period of not less than
7 120 days to take corrective action as
8 the Secretary determines to be nec-
9 essary to comply with the applicable
10 agreement; and

11 “(III) on request of the Governor
12 of the State, a detailed description of
13 each responsibility in need of correc-
14 tive action regarding an inadequacy
15 identified under clause (i); and

16 “(iii) the State, after the period pro-
17 vided under clause (ii), fails to take satis-
18 factory corrective action, as determined by
19 the Secretary.

20 “(B) TERMINATION BY THE STATE.—A
21 State, at any time, may terminate the participa-
22 tion of the State in the program under this sub-
23 section by providing to the Secretary notice not
24 later than 90 days before the date on which
25 that termination will take effect, subject to such

1 terms and conditions as the Secretary may pro-
2 vide.

3 “(h) JUDICIAL REVIEW.—

4 “(1) IN GENERAL.—Subject to paragraph (2),
5 nothing in this section shall affect whether any final
6 Federal agency action may be reviewed in a court of
7 the United States or of any State.

8 “(2) EFFICIENCY OF CLAIMS.—

9 “(A) STATUTE OF LIMITATIONS.—Not-
10 withstanding any other provision of law, and ex-
11 cept as provided in subparagraph (B), a claim
12 arising under Federal law seeking judicial re-
13 view of Federal financial assistance provided
14 under this title, or with respect to any author-
15 ization issued or denied under NEPA by the
16 Secretary for a covered activity, shall be barred
17 unless the claim is filed not later than 150 days
18 after the date on which the Secretary an-
19 nounces that, as applicable—

20 “(i) the Secretary has approved the
21 application for such Federal financial as-
22 sistance;

23 “(ii) the Secretary has issued that au-
24 thorization; or

1 “(iii) the Secretary has denied that
2 authorization.

3 “(B) EXCEPTION.—Subparagraph (A)
4 shall not apply if a shorter deadline than the
5 applicable deadline under that subparagraph is
6 specified in the Federal law under which judi-
7 cial review is allowed.

8 “(i) USE OF APPROPRIATED FUNDS.—To carry out
9 the activities under subsections (e) through (g), the Sec-
10 retary may use amounts made available to the Secretary
11 under section 102(a)(2)(B)(ii) of the CHIPS Act of 2022
12 (15 U.S.C. 4651 note).

13 “(j) DEFINITIONS.—In this section:

14 “(1) COVERED ACTIVITY.—The term ‘covered
15 activity’ means any activity relating to the construc-
16 tion, expansion, or modernization of a facility, the
17 investment in which is eligible for Federal financial
18 assistance under section 9902 or 9906.

19 “(2) NEPA.—The term ‘NEPA’ means the Na-
20 tional Environmental Policy Act of 1969 (42 U.S.C.
21 4321 et seq.).”.

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